UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

SALLY C. WARREN, **Plaintiff,** **v.** **JOSTENS, INC., a foreign corporation,** **Defendant.**	**Case No. 99 C 8302** **Judge Harry D. Leinenweber**

MEMORANDUM OPINION AND ORDER

BACKGROUND

The plaintiff began working at Jostens, a jewelry manufacturing firm in Princeton, Illinois facility, in December 1989. Over the years plaintiff was employed in a variety of positions in belt buckle production. In July 1994 she was given the job of plater, which involved pre-cleaning, dry buffing, and sandblasting belt buckles. Dry buffing and sandblasting creates a somewhat dusty atmosphere.

In July 1991, plaintiff, who had a history of asthma, was examined by Dr. Peter Baum, an allergist. He diagnosed her condition as very mild asthma, but did not consider it to be a serious problem for her and did not restrict her work duties. Plaintiff next saw Dr. Baum on October 26, 1994 and reported to him that she thought plating and sandblasting was affecting her asthma. Although she presented very mild symptoms, Baum thought

she should use a mask or respirator at work and might need a change in work duties. He next saw her in December 1995 and concluded that her asthma was slightly worse compared to her condition in 1991. He gave her a note for her employer stating that he thought her asthma was exacerbated by dry buffing and requesting that she be excused from this type of work. There is some question whether this note was given to Jostens but nevertheless, a flare up of her asthma symptoms occurred in January 1996, causing her to miss several days at work, after which Baum faxed Jostens a note asking that she be moved to another department. Jostens immediately restricted her from plating and dry buffing duties and when Dr. Baum next examined her later that month he found her condition to be improved.

Plaintiff's superiors felt that they needed more information from Dr. Baum in order to find an appropriate position for her, so she was asked to give him a list of chemicals to which she might be exposed as a plater. However all they received back was a repeat of his recommendation that she not perform sandblasting and dry buffing. Baum did not return Jostens' phone calls seeking more information so plaintiff was asked to submit to an examination by the company doctor. She agreed and on April 3, 1996, Dr. Greg Davis examined plaintiff, her medical records, and visited the plant. He concluded that she should

avoid sandblasting and dry buffing, and should also be restricted from polishing and lacquering activities. Accordingly, plaintiff was restricted from these duties. When there was insufficient work due to her restrictions to keep her busy she was loaned to other work areas that could meet her work restrictions. In December 1996, her job was changed from plater to engraver and in January 1997 she applied for and was given the position of watch assembler.

The record does not indicate that she suffered from any physical problems related to her asthma after April 1996. Her asthma was found to be well controlled in May, October, and December 1996, when she saw Dr. Ramon B. Inciong, an internist, for an unrelated medical condition. She saw Dr. Baum again on January 10, 1997, who likewise found her asthma to be under control. Dr. Inciong testified that her asthma did not limit her ability to do any jobs that an average person with her skills, training and ability would be able to perform.

Jostens has a policy to fill vacant positions at its plant with current employees where possible but to give the position to the individual considered to be the best candidate for the job. Between March 14, 1996 and January 27, 1997, it posted 28 positions only one of which, the position of stone cutter, did

plaintiff apply. She was considered for this position but it was given to another employee who was considered more qualified.

In June 1996 plaintiff filed two worker's compensation claims for injuries she alleged resulted from her exposure to sandblasting and dry buffing. Both of these claims were settled in May 1999.

Jostens had a written attendance policy which required employees to notify their administrative team leader, or other team member, no later than 30 minutes after the start of the work shift if they were unable to be at work. Failure to give proper notice can result in disciplinary action. Missing three consecutive work days without proper notification is grounds for termination.

On March 3, 1997, plaintiff informed her watch team that she was intending to go to the Mayo Clinic and would miss work on March 6 and 7 and possibly on Monday, March 10. She also told this to the human resources department. However she neither appeared for work nor called in on Tuesday, Wednesday or Thursday, March 11, 12 and 13, 1997. As a result on March 13, plaintiff's employment at Jostens was terminated. During the period January 1991 through March 1997, four other Jostens' employees were fired for failing to appear for work or call in for three consecutive work days. None of the four had filed a

worker's compensation claim or was working under any medical work restriction.

As a result of her termination plaintiff filed a complaint with the Equal Employment Opportunity Commission (the "EEOC") contending that Jostens had violated the Americans with Disabilities Act of 1990 (the "ADA") by failing to provide her with reasonable accommodation and by terminating her. She received a right to sue letter from the EEOC and filed this complaint, alleging violation of the ADA and violations of the Illinois common law for discharging her in retaliation for filing workers' compensation claims. Defendant has moved for summary judgment.

DISCUSSION

Jostens' first argument for summary judgment takes direct aim at plaintiff's ADA case. It contends that plaintiff is not a disabled person within the meaning of the ADA because she does not suffer from a physical or mental impairment that substantially limits one or more of the major life activities. *See* 42 U.S.C. § 12102(2)(A). Plaintiff contends that she is restricted due to her asthma, which substantially impairs and limits her breathing, lifting, standing, and walking. These limitations also substantially limit her in the activity of working because she was transferred from her job requiring sand

blasting and dry buffing on the advice of Drs. Baum and Davis. Plaintiff cites *Reimer v. Ill. Dep't. of Transportation*, 148 F.3d 800 (7th Cir.1998) in support of her position.

Reimer involved an employee who also had asthma. The employee's doctor requested a medical leave due to fumes aggravating his asthma. At the end of the leave the doctor advised the employer that the employee could resume work as before as his asthma was 100% controlled. Nevertheless the employer had plaintiff examined by its own doctor who recommended that plaintiff be reassigned over plaintiff's objection to a less favorable position. The employer was motivated in part by the fear of a potential worker's compensation claim. The court held that the jury's finding that the employer perceived the employee to be disabled was not against the manifest weight of the evidence because the employer chose not to believe the plaintiff's doctor. In our case, Jostens followed the plaintiff's doctor's recommendation and transferred the plaintiff to positions that did not aggravate her asthma. All of the doctors believed her asthma was well controlled after her transfer and it appears that this continues to be the case because the plaintiff has been continuously employed in a variety of jobs since her termination and is currently engaged in aerobic activities. She therefore has not

produced any evidence that there are any major life activities, including breathing, of which she is substantially limited.

However, plaintiff urges that she is also substantially limited in the major life activity of working because she cannot perform sandblasting and dry buffing which are duties necessary to the job of a plater. If the alleged substantially limited major life activity is working, as plaintiff here claims, this means under the ADA that plaintiff is "significantly restricted in the ability to perform either a class of jobs or a broad range of jobs in various classes as compared to the average person having comparable training, skills and abilities." 29 C.F.R. § 1630.2(j)(3)(i). The inability to perform a specific job does not necessarily mean that the ability of work is "substantially restricted," because the employee must be restricted from a class of jobs or a broad range of jobs. A "class of jobs" is the job from which a claimant is disqualified as well as all other jobs utilizing similar training, knowledge, and skills within the geographical area to which the claimant has reasonable access. 29 C.F.R. § 1630.2(j)(3)(ii)(A)-(B). A "broad range of jobs on various classes," in contrast, is the job from which a claimant was disqualified as well as all other jobs not utilizing similar training, knowledge, and skills within the geographical area to which the claimant has

reasonable access. 29 C.F.R. § 1630.2(j)(3)(ii)(A),(C). While there is no requirement of an "onerous evidentiary showing" to establish either category, the regulations do require "presentation of evidence of general employment demographics and/or of recognized occupational classifications that indicate the approximate number of jobs (*e.g.*, 'few,' 'many,' 'most') from which an individual wold be excluded because of an impairment." 29 C.F.R. Pt. 1630, App. § 16730.2(j). This case, like the case involving repetitive motion jobs in *E.E.O.C. v. Rockwell International Corp.*, Nos. 11-1897 & 00-2034, slip op.(7th Cir. March 8, 2110), is not one of the rare cases in which the impairments are so severe that a substantial foreclosure from the job market is obvious. Thus it is the duty of the plaintiff, as it was the duty of the EEOC in *Rockwell*, to come up with some evidence of the number and type of jobs from she was excluded because of the actual or perceived impairment. The fact that Jostens may have perceived plaintiff as unable to perform the sandblasting or dry buffing jobs does not raise the inference that Jostens considered plaintiff as significantly restricted. Nor does plaintiff's inability to perform these activities raise an inference that the plaintiff's ability to work is significantly restricted. *Rockwell*, slip op. p. 9. *See*

also, Skorup v. Modern Door Corp., 153 F.3d 512, 515 (7th Cir. 1998).

Even if plaintiff was a disabled person under the Act, nevertheless Jostens reasonably accommodated such disability. In 1996 it immediately transferred her to another position without loss of pay when her work restriction was called to its attention, and it promoted her to the position of watch assembler at her request in 1997. Jostens provides a job filling mechanism which favors current employees like the plaintiff. The record in this case shows that between March 1996, when plaintiff's restrictions were called to its attention, and her termination in 1997, 28 jobs were posted for which plaintiff presumably could have applied. In fact she applied for only one of them which went to another employee that Jostens felt was more qualified. While plaintiff complains that Jostens did not engage in a meaningful "interactive process," the record shows that it went out of its way to obtain the necessary information and to work with plaintiff to find a job that was suitable for her.

Finally, plaintiff claims that her termination was pretextual. She contends that she told the members of her watch team that she might miss additional work which eliminated the need to call in to report her continued absence. However telling an employer that you may be absent and telling him that

you will be absent are two different things. The rule clearly required notification which plaintiff did not give. Furthermore the record shows that four other employees, none of whom had either a disability or a worker's compensation claim, were fired for precisely the same reason. Plaintiff has not pointed to any Jostens' employee that was more favorably treated. The rule is reasonable and Jostens was entitled to enforce it.

CONCLUSION

Since plaintiff was not a disabled person and in any event plaintiff was not subjected to any adverse job action because of any disability or perceived disability, and her termination was not pretextual, consequently the Motion for Summary Judgment is granted as to the federal ADA claims. The balance of the complaint consisting of the state law claims is dismissed for want of federal jurisdiction.

IT IS SO ORDERED.

Harry D. Leinenweber, Judge
United States District Court

Date: _____